SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. 309

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 309, DICK KLINGE, Its Business Agent, and MEL ANDREWS, Its Secretary,

Petitioners,

vs.

A. E. HANKE, L. J. HANKE, R. R. HANKE and R. M. HANKE, Copartners Doing Business Under the Name and Style of ATLAS AUTO REBUILD,

Respondents.

No. 364

AUTOMOBILE DRIVERS AND DEMONSTRATORS LOCAL UNION NO. 882, RALPH REINERTSEN, Its Business Agent, and J. J. ROHAN, Its Secretary,

Petitioners,

vs.

GEORGE E. CLINE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

BRIEF ON BEHALF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
736 Bowen Building,
Washington 5, D. C.,
Counsel for
American Federation of Labor

INDEX

Subject Index

Table of Cases Cited

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. 309

NTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 309, DICK KLINGE, Its Business Agent, and MEL ANDREWS, Its Secretary,

Petitioners,

vs.

A. E. HANKE, L. J. HANKE, R. R. HANKE and R. M. HANKE, Copartners Doing Business Under the Name and Style of ATLAS AUTO REBUILD,

Respondents.

No. 364

AUTOMOBILE DRIVERS AND DEMONSTRATORS LOCAL UNION NO. 882, RALPH REINERTSEN, Its Business Agent, and J. J. ROHAN, Its Secretary,

Petitioners,

vs.

GEORGE E. CLINE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

BRIEF ON BEHALF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

Interest in Proceedings

The American Federation of Labor has requested the parties to the above cases for permission to file a brief as

amicus curiae and has been granted such permission. The interest of the American Federation of Labor in these cases arises out of the fact that it appears that any decisions herein will involve an examination of the extent and scope of the entire concept of picketing as a concommitant of free speech, so that this Honorable Court's ultimate determination will have an important impact upon all of organized labor. The protections given to the right to peacefully picket under prior decisions of this Court are directly threatened by the determinations of the Supreme Court of Washington in the above two cases, and the American Federation of Labor desires the indulgence of this Court to present its views on the issues here involved. A reading of the records, decisions, and briefs in the above cases convince us that are here presented important issues beyond and in addition to those briefed by counsel for the parties and we deem it necessary to a proper determination of these cases that such additional issues as set forth below be presented and discussed. We have been unable to file this brief prior to the present date because we have not until now had opportunity to study all the briefs of the parties to these proceedings.

The Issues

A reading of the briefs filed in the above cases by counsel for appellants and respondents discloses an apparent considerable variance concerning the scope of the issue or issues involved. It is, of course, indispensable to a proper determination of these cases that the issues be precisely defined and that the implication of the state courts' decisions herein be clearly comprehended. The issues and the implication of the state court decisions can be ascertained only by determining the following: (1) the purpose or objective of the picketing that took place in the two cases, (2) the manner in which the picketing was carried on, (3) the scope

of the injunctions against the picketing, and (4) the theory or reasoning under which the injunctions against picketing were sustained by the state court.

Both cases involved an attempt by locals of the International Brotherhood of Teamsters, A. F. of L., peacefully to picket the premises of automobile dealers in the Seattle, Washington, area in a labor dispute involving the hours of operation of such dealers. All such picketing in such dispute was enjoined by the Washington courts.

1. The Purpose of the Picketing in Both Case 309 and Case 364 Was to Protest Failure of an Employer to Observe Union Hours of Operation; an Additional Purpose in Case 364 Was to Protest Failure to Employ One Union Salesman.

In Case No. 309 the trial court made specific findings of fact that the purpose of the picketing was simply to protest the fact that the automobile dealer in question insisted on operating his business on Saturdays, Sundays and holidays contrary to the practice established in the area under union agreements of not working on those days. As found by the trial court (Findings of Fact No. VIII, R. 14):

> "They did not insist on the plaintiffs becoming members of said Local 882 or the defendant Local No. 309, but merely protested as to their violation of the clause of the agreement [relating to days of operation] above quoted."

The Supreme Court of Washington, in its decision in the Local No. 309 case (R. 22), found that

> "The substance of the conversation that took place at that time, as found by the trial court, is that the representatives of Local 309 demanded that respondents comply with the terms of the agreement entered into by and between Local 882 and Independent Automobile Dealers Association [relating to days of operation], . . ."

It is true that further on in its decision the Court did state (R. 26) that

> "The purpose of the picketing in the present instance was (1), indirectly, to compel the respondents to become members of one or the other, or possibly both, of the two unions above mentioned; and (2), directly, to coerce the respondents to enter into an agreement under which they would carry on their business only during the hours and days arbitrarily fixed by the Automobile Salesmen's Union, Local 882."

However, the statement that it was "indirectly" the purpose to compel respondents to become members of the union is a gratuitous assumption not based on anything in the record and directly contrary to the unchallenged specific finding of the trial court that the union "did not insist on the plaintiffs becoming members of said Local 882 or the defendant Local No. 309". (R. 14). Accordingly, this assumption of the Supreme Court of Washington concerning the indirect purpose of the picketing must be disregarded, and we are left with the conclusion that the sole purpose of the picketing in Case No. 309 was to require the automobile dealer in question to conform to the hours prescribed in union contracts prevalent in the area.

In Case No. 364 the trial court found as follows concerning the purpose of the picketing (Finding No. VIII, R. 7):

> "That the defendant union in accordance with its new contract with the Dealers Association is demanding that as a condition to the removal of said pickets, Plaintiff refrain from opening his place of business after 1:00 o'clock on Saturdays, and that Plaintiff further employ a member of the Defendant union, said employees to be compensated by being paid Seven (7%) per cent of all sales made at Plaintiff's place of business, irrespective of whether or not any sale might be made by Plaintiff."

The Supreme Court of Washington, in its decision, made the identical finding (R. 23). From the foregoing it is clear that the purpose of the picketing in Case No. 364 was identical with the purpose in Case No. 309, and that, in addition,

in Case No. 364 the purpose of the picketing was to protest the failure of the employer to employ a union member. (For the purpose of this brief amicus curiae, we will assume that the purpose of the picketing in Case No. 364 was as found by the trial court and by the State Supreme Court, and we will nevertheless demonstrate that the blanket injunction therein must either be modified or withdrawn.)

2. The Picketing in Both Cases Was Entirely Peaceful.

The trial court in Case No. 309 specifically found (R. 15) that "Said picketing was entirely peaceful, the picket neither threatening nor molesting anyone seeking to enter or leave plaintiffs' place of business." The trial court in Case No. 364 made a similar finding (R. 7):

> "That said picketing was entirely peaceful, the pickets neither using force nor threatening physical violence nor molesting anyone either seeking to enter or leave Plaintiff's place of business."

These findings were expressly affirmed by the State Supreme Court in its decisions in both cases (Case No. 309, R. 22; Case No. 364, R. 23).

The picket sign in Case No. 309 simply stated that "Union people look for the union shop card" (R. 15, 22). In Case No. 364 the sign simply stated that the employer's place of business was "unfair" to the union (R. 7, 23). In Case 309 only one picket was used who carried the sign in question; in Case 364 normally two pickets were used.

3. The Injunction in Both Cases Was a Blanket One Forbidding Any and All Types of Picketing, Regardless of Purpose.

The injunction issued by the trial court in both Case No. 309 (R. 17) and in Case No. 364 (R. 16) provided as follows:

> ". . . the defendants, and each of them, be and they are hereby permanently restrained and enjoined from

in any manner picketing the plaintiffs' place of business . . ."

These injunctions were sustained by the Supreme Court of Washington (Case No. 309, R. 27; Case No. 364, R. 25). Thus it can be seen that the injunction in both cases was an extremely broad and all-inclusive one, leaving no exception for the manner or place in which the picketing was being conducted, or the purpose of the picketing. More specifically, in both cases the picketing to protest the refusal of the employer to work the union scale of hours was interdicted, so that the unions in question were forbidden by the use of picket signs to call the public's attention to the fact that the dealer was operating in excess of union hours to the end that those sympathetic with the position of the union might refuse to patronize the dealer's business.

4. The Blanket Injunction Against Peaceful Picketing Was Sustained by the State Supreme Court on the Theory (1) That, Because the Picketing Was Effective in Lessening Patronage, It Inflicted Economic Injury and Was Therefore Coercive and Unlawful, (2) That the Unions' Demands Were Arbitrary, So That Restrictions on Picketing Were Justified as "Necessary to Protect Property Rights," and (3) That There Existed No Immediate Employer-Employee Relationship. In Addition, the Prohibition on Picketing in Case No. 364 Was Sustained on the Theory, Presumably, That the Purpose Was to Require the Employer to Hire a Union Salesman, Such Requirement Being Forbidden by State Law.

A reading of the State Supreme Court's decision in Case No. 309 indicates conclusively that the Court was concerned primarily with its right to protect property rights against union demands that the Court considered arbitrary or excessive and, therefore, illegal, even though not declared illegal by state statute or at common law, and against

picketing which the Court considered coercive because it was effective. The following excerpts from the Court's decision are indicative of this concept:

> ". . . nor do we believe that the United States Supreme Court has ever said that a state is without power to abridge this right [free speech] where such a course is necessary to protect property rights and is in the general interests of the community." (R. 27.)
>
> "From this fact, the conclusion seems irresistible that the union's interest in the welfare of a mere handful of members (of whose working conditions no complaint at all is made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy." (R. 30.)
>
> "In our opinion, there is small reason for holding that the appellant union, acting under the guise of protecting the union's freedom of speech, cannot be restrained from depriving the respondents of the liberty of lawfully conducting their business in the only manner that it could be profitably conducted." (R. 31.)

The Court equated protections available to property and business rights under the Constitution with the constitutional protections afforded the right of free speech. It stated in this respect as follows:

> "In the instant case, we are concerned with balancing appellants' [the employers'] right to carry on lawful businesses, free from unreasonable interference, and respondents' [picketing members of a union] right to freedom of speech. Neither of these rights is absolute, in the sense that it may be exercised in utter disregard of the other; both cannot be unqualifiedly exercised at the same time. It is within the power of the court to decide whether appellants should be denied their right to conduct their businesses free from unjustifiable interference by respondents, or whether

respondents' rights of freedom of speech should be reasonably limited." (R. 27.)

In addition, there is general language throughout the decision indicating that the Court finds justification for the injunction in the fact that there is no dispute between the employer and his immediate employees, the employer having no employees.

In Case No. 364 the Supreme Court predicated its decision in upholding the injunction on its reasoning in Case No. 309, expressly adopting its views there as applicable to the situation in Case No. 364. In addition, in Case No. 364 the Court relied on its ruling in the matter of *Gazzam v. Building Service Employees International Union,* 29 Wash. (2d) 488, 188 P. (2d) 97. In that case the Court had held that any attempt by peaceful picketing to require an employer to "force" his employees to join a union was contrary to state law as prescribed in the declaration of policy in the state Little Norris-LaGuardia Act and was, therefore, enjoinable.

It is to be noted that in Case No. 309 the purpose of the picketing is not illegal either under state statute or under state common law; that is, there is nothing in the law of the State of Washington to prevent an employer from acceding to a union's request that it work only on certain days or hours of the week, nor is there any law in the State of Washington to prevent a union from attempting to limit hours of employment. Similarly, in Case No. 364 there was nothing unlawful in the first purpose of the union to require the employer to conform to union-established days of operation. Whether there was anything unlawful in the second purpose of the picketing (to protest the failure to hire union members) is an issue which will be determined in Case No. 449. However, irrespective of legality or illegality of this second purpose, the Court enjoined all picketing regardless of purpose or method.

Having determined the purpose and manner of the picket-

ing, the scope of the injunctions and the theory on which the injunctions were sustained by the Supreme Court of Washington, it is now possible more precisely to determine the issues which confront this Court in the present cases and the questions which must be determined. We respectfully submit that they are as follows:

1. (Applicable to both cases) Can a state court, consistent with the First Amendment, impose blanket restrictions upon peaceful picketing even though no direct employer-employee relationship exists in the particular labor dispute, by terming the union objectives therein unlawful even though such objectives are traditional ones and not unlawful under state statute or common law, and by terming the picketing coercive because effective in reducing patronage?

2. (Applicable solely to Case 364) Can a state court, consistent with the First Amendment, impose a blanket injunction against peaceful picketing, regardless of the purposes of the picketing, in a situation where one purpose is lawful and the other purpose may be unlawful?

It is respectfully submitted that the answer to both of the above queries is No. The reasons for this conclusion follow.

ARGUMENT

I.

A STATE COURT CANNOT, CONSISTENT WITH THE FIRST AMENDMENT, IMPOSE BLANKET RESTRICTIONS UPON PEACEFUL PICKETING, EVEN THOUGH NO DIRECT EMPLOYER-EMPLOYEE RELATIONSHIP EXISTS IN THE PARTICULAR LABOR DISPUTE, BY TERMING THE UNION OBJECTIVES THEREIN UNLAWFUL WHERE SUCH OBJECTIVES ARE TRADITIONAL ONES AND NOT UNLAWFUL UNDER STATE STATUTE OR COMMON LAW, OR BY TERMING THE PICKETING COERCIVE BECAUSE EFFECTIVE IN REDUCING PATRONAGE.

In so far as the purpose or object of the picketing in both Case No. 309 and Case No. 364 was to require an employer to comply with certain hours or days of labor prevalent under union agreements in the area, it is to be noted that the Supreme Court of Washington did not and could not find that such objective or its accomplishment was in itself an unlawful one under state law, statutory, constitutional or common. On the contrary, the establishment of minimum hours of operation or days of rest and recreation has traditionally constituted a prime function of trade unions. An automobile dealer in the Seattle area could, as most dealers did, agree with a labor organization not to operate on Saturdays, Sundays and holidays without violating any state or municipal law.

In *Wright v. Teamsters Union,* 133 Wash. Dec. 869, 207 Pac. (2d) 662 (decided June 24, 1949), there was involved a situation where the union was picketing for the purpose of requiring the employer not to operate on Sundays. The Supreme Court of Washington, in noting that this purpose was a perfectly lawful one, stated as follows:

> "In the instant case, on the other hand, Owens being a union member, the union had a clear right to proceed against Wright in order to persuade him to enter into an agreement with it whereby Owens would be worked under the same conditions as other union members in the Pasco vicinity. . . .
>
> "It is incidentally noteworthy that the union's position derives a certain added equitable force from the fact that the chief reason that Wright declined to sign the agreement was that he wished the market to continue selling meat on Sundays; in spite of the fact that Rem. Red. Stat., Sec. 2494, provides as follows: 'Every person who, on the first day of the week, shall . . . sell, offer or expose for sale, any personal property, shall be guilty of a misdemeanor; provided, . . . nothing in this section shall be construed to permit the sale of uncooked meats. . . .' "

The situation, then, in Cases No. 309 and 364 is entirely distinguishable from the situation in the *Giboney* case (*Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490) where the object of the interdicted picketing was found by this Court to be to require an employer to enter into an agreement in itself unlawful under a valid state anti-trust law. Accordingly, the only possible justifications for the blanket injunctions against picketing to require the employer to conform to the union hours of labor which could be, and which in fact were, advanced by the State Supreme Court were (1) that no immediate employer-employee relationship existed, none of the automobile dealer's employees or partners being members of the union or desiring to join the union, and (2) that the picketing was coercive not because of the presence of any violence or intimidation but because it was effective in causing economic hurt to plaintiff's business by withdrawal of patronage, and the demand of the union being unlawful because, in its opinion, it was "arbitrary."[1]

As to the first of the foregoing justifications—lack of immediate employer-employee relationship—it would appear that the decisions of this Court in *American Federation of Labor v. Swing*, 312 U.S. 321, *Bakery & Pastry Drivers, etc., v. Wohl*, 315 U.S. 769, and *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, are conclusive on the proposition that mere absence of an immediate employer-employee relationship in itself does not constitute sufficient warranty for state proscription of the right to picket. These cases and their application to the present

---

[1]There is some suggestion in the opinion of the Washington Supreme Court in Case No. 309 that union interests could be disregarded because it represented "only a mere handful of members" (R. 30). The inadequacies of such justification, if indeed it has been advanced as one, for restrictions on peaceful picketing is so obvious as to warrant no discussion. "The interdependence of economic interest of all engaged in the same industry has become a commonplace." *American Federation of Labor v. Swing*, 312 U.S. at 326. See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, and *Thornhill v. Alabama*, 310 U.S. 88.

cases are fully discussed in the petitioners' briefs in Cases Nos. 309 and 364. It would appear that, unless this Court is prepared to overrule its determination in the above cases, the claimed justification by reason of lack of employer-employee relationship must be deemed insufficient.

The justification of alleged "coercive" picketing and alleged "arbitrary" demands requires somewhat fuller discussion. The proposition has long since been laid down by this Court that the economic consequences of peaceful picketing in themselves afford no justification for prohibition of such picketing which is otherwise permissible. The theory of the Washington court was that, since the picketing in Cases Nos. 309 and 364 operated to impair the right of the employer to carry on his business free from the interference of others, and because the picketing results in diversion of patronage and services from the employer and thereby caused economic loss, it may be prohibited. The argument is that because union workers do not, save in exceptional circumstances, cross a picket line, either to perform services or to purchase goods, thereby injuring the picketed enterprise, these economic consequences of picketing render it subject to prohibition.

What this argument comes to is that because of its concern for the economic interests of business enterprises which are involved in labor disputes, a court may prohibit employees from exercising their constitutional right to peaceful picketing. This argument has been repeatedly rejected by this Court.

In *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, at 193, the Supreme Court referred to peaceful picketing as "the workingman's method of communication." In *Thornhill v. Alabama*, 310 U.S. 88, at 103, the Court held that the "right of employees effectively to inform the public [through picketing] of the facts of a labor dispute" is "within that area of free discussion that is guaranteed by the Constitution."

Those who would deny to peaceful picketing the protections of the First Amendment have always argued that peaceful picketing may be banned because its purpose is to persuade persons not to perform services or to purchase merchandise and that the resultant detriment to the business picketed should take precedence over the worker's interests. It was on this theory that Shasta County, California, sought to justify the ban on picketing which was invalidated by the Supreme Court in the *Carlson* case (*Carlson v. California*, 310 U.S. 106, 112). The Court there said:

> "It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or a member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; disinterested persons (who might be hired to carry signs) appear to be a possible, but unlikely, exception. In brief, the ordinance . . . proscribes the carrying of signs only if by persons directly interested who approach the vicinity of a labor dispute to convey information about the dispute."

In the *Thornhill* case, 310 U.S. at 104, the Supreme Court recognized that picketing, if effective, might have serious economic repercussions upon the picketed enterprise. This, said the Court, did not serve to remove picketing from the orbit of constitutional protection. Picketing, the Court held, "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. . . . The danger of injury to an industrial concern is neither

so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in § 3448."

In *Thomas v. Collins*, 323 U.S. 516, 527, the Supreme Court noted that free speech cannot be stultified by limiting it to communications which do not tend to result in action.

> "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given."

In the *Swing* case, where the state sought to justify the ban on picketing on exactly the same grounds respondent seeks to justify the ban here, i.e., to protect a "neutral" employer against "interference with his business," the Court disposed of the contention by saying (312 U.S. at 326):

> "Communication by such employees (strangers to the employer) of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred *by concern for the economic interests against which they are seeking to enlist public opinion* than could the utterance protected in *Thornhill's* case." (Emphasis supplied.)

Finally, in the *Wohl* case, *supra*, the Supreme Court held that economic injury resulting to non-union bakery drivers, to manufacturing bakers, and to retailers who purchased bread from the non-union drivers was "no substantial evil of such magnitude as to mark a limit to free speech."

The cases discussed above show that the economic consequences of picketing justify its restriction only where picketing is used against an enterprise which, in the light of economic realities, is totally outside the context of the labor dispute. Restrictions upon peaceful picketing within the area of economic conflict which the Supreme Court has held it beyond the power of government to limit can be

justified, if at all, only by showing that such picketing gives rise to grave and imminent dangers of substantial evil to the public interest. *Thornhill's* case, *supra; Thomas v. Collins, supra; Wohl* case, *supra.*

The foregoing discussion is also relevant to the question of whether a state court can attempt to judge the merit or lack of merit, the economic justification or lack of justification in any particular demands of a labor organization, assuming that such demands or the granting of them would not contravene any valid state law and assuming that such demands, as in the present cases, are reasonably related to the establishment of wages, hours, conditions of employment or other traditional union objectives. To say that in the instant cases the mere pronouncement by a state court that a particular economic demand is arbitrary, and that therefore picketing, and presumably striking, to enforce such demand can be enjoined (in this connection note the statement of the trial judge in Case No. 309 (R. 100) that "and I may say in passing that the clause in the working agreement regarding the hours heretofore set out seems to me a fair, just and reasonable one") is not only to impose in the courts a right to suppress the dissemination of information, through peaceful picketing, denied to legislative bodies in such cases as *Thomas v. Collins, supra; American Federation of Labor v. Swing, supra; Bakery & Pastry Drivers v. Wohl, supra,* and *Cafeteria Employees Union v. Angelos, supra,* but further to hearken back to the pre-dawn era of industrial relations when striking, picketing and the very formation of labor unions were enjoined by the courts as inherently evil or conspiratorial.

Entirely aside from any of the free speech aspects of peaceful picketing, it would appear that suppression or prohibition of the right, as other rights protected under the Fourteenth Amendment even though not under the First, must rest at least upon legislative determination under the rational basis test. Otherwise, constitutional pro-

tections would be subject to the whims and caprices of individual judges framing judgments upon their individual predilections and preconceptions. See *Bridges v. California,* 314 U.S. 252, at 260, where this Court said: ". . . the problem is different where 'a judgment is based on a common law concept of the most general and undefined nature' [rather than when the judgment comes] . . . encased in the armor wrought by prior legislative deliberation."

It is clear that, if the decisions of the Washington Supreme Court in Cases Nos. 309 and 364 are sustained, then there is no principle of constitutional law to prevent any court anywhere from holding any strike or picketing in any traditional labor dispute illegal merely because such strike or picketing is effective or merely because, in the particular court's judgment, a particular economic demand appears arbitrary, although the making of such demand or its granting is in no way prohibited under state law and, in fact, the particular demand, as in the present cases, is a traditional one embodied in union agreements covering a major portion of the industry.

It appears that the fundamental error in the Washington court's reasoning in its decisions in No. 309 and No. 364 lies in its attempt to equate civil rights finding protection under the First Amendment with property rights finding protection solely under the Fourteenth Amendment. Time and again that Court refers to a balancing of the economic interests of the employer with the free speech rights of the union. Such equating of civil and property rights ignores the many determinations of this Court that civil rights specifically protected against legislative abridgment under the First and Fourteenth Amendments are entitled to a higher degree of protection than property rights protected only under the vague contours of the Fourteenth Amendment, and that, if our fundamental liberties are to survive, the state cannot support prohibitions or restrictions of

First Amendment rights simply by a showing of rational basis, but only by a showing of compelling public necessity under the clear and present danger rule. Speaking of the basic liberties of speech and assembly, this Court stated in the *Thomas* case, 323 U.S. at 530:

> "Any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

Since fundamental rights, as distinguished from property rights, are here involved, "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. . . . Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448." *Thornhill v. Alabama*, 310 U.S. at 95 and 104. See also *West Virginia v. Barnette*, 319 U.S. 624, at 638.

II

A STATE COURT CANNOT, CONSISTENT WITH THE FIRST AMENDMENT, IMPOSE A BLANKET INJUNCTION AGAINST PEACEFUL PICKETING, REGARDLESS OF THE PURPOSE OF THE PICKETING, IN A SITUATION WHERE ONE PURPOSE IS LAWFUL AND THE OTHER PURPOSE MAY BE UNLAWFUL.

As discussed previously, the Court found in Case No. 364 that the picketing had two objectives: first, to require the employer to observe union hours of operation, and second to require the employer to employ a union member.[2]

We have seen in the discussion under Part I of this argument that there is no justification for a prohibition against peaceful picketing in a dispute over hours of operation. Whether there is justification for a prohibition against peaceful picketing in a dispute over employment of union members is a question which is now before this Court in Case No. 449 (*Gazzam v. Building Service Employees International Union*, et al., *supra*). While we support the position of the petitioners in Case No. 449, we will not here attempt to elaborate upon the very able brief presented by counsel for petitioners therein. For the purpose of the instant cases and particularly Case No. 364, we can assume, without of course agreeing, that it has somehow been made unlawful

---

[2]While the State Supreme Court, in Case No. 309, concluded that one of the purposes of the picketing in that case was "indirectly to compel respondents to become members of one or the other, or possibly both, of the two unions" (R. 26), we have seen that such an assumption is not supported by the record and is in direct conflict with the finding of the trial court that:

> "They [the unions] did not insist on the plaintiffs becoming members of said Local 882 or the defendant Local No. 309, but merely protested as to their violation of the clause of the agreement above quoted" [the agreement providing for no work on Saturdays, Sundays and holidays] (R. 14).

Further, such a conclusion is inconsistent with an earlier statement of the Court in its same opinion that the substance of the conversation between the union representatives and the automobile dealer was that the automobile dealer would have to comply with the union-prescribed days of operation or be subjected to economic reprisals (R. 22).

by a state statute for an employer to require an employee to become a member of a union, and that accordingly, under the principles of the *Giboney* case, *supra*, picketing to require an employer to employ union members in the face of such state law can be enjoined.[3] Nevertheless, it is submitted that the blanket injunction in Case No. 364, broadly prohibiting any and all picketing "in any manner" and regardless of purpose, impairs rights protected under the First Amendment and must either be dissolved or amended so as to permit peaceful picketing in so far as the purpose may be other than to require the employment of union labor. For obviously, the blanket injunction sweeps within its broad ambit both the legal and the illegal, the licit and the illicit. It has been affirmed on numerous occasions by this Court that, where First Amendment freedoms are concerned, allowable restrictions thereon must be narrowly drawn so as to meet the precise evils the state may be permitted to proscribe and so as to leave unimpaired the right of persons to exercise such freedoms for purposes and for objectives which the state has not proscribed and which are otherwise allowable. See *Cantwell v. Connecticut*, 310 U.S. 296; *Thornhill v. Alabama, supra; Schneider v. State*, 308 U.S. 147; *DeJonge v. Oregon*, 299 U.S. 353; *Saia v. New York*, 334 U.S. 558; *Winters v. New York*, 333 U.S. 507. See in this connection the dissenting opinion in *United States v. C.I.O.*, 335 U.S. 106, at 153, where it is stated:

> "Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with long-established constitutional principles surrounding their delimitation.

[3]This is not to admit or even to assume that peaceful picketing for the purpose of calling to the attention of the public the fact that a firm is not employing union labor or observing union conditions (but without making any request upon the employer that he enter into union-shop agreements and discharge non-union employees) and for the purpose of soliciting those sympathetic to the principles of organized labor not to patronize the employer in question, could, under the principles of the *Giboney* case or any other case be enjoined.

> They measure up neither to the requirement of narrow drafting to meet the precise evil sought to be curbed nor to the one that conduct proscribed must be defined with sufficient specificity not to blanket large areas of unforbidden conduct with doubt and uncertainty of coverage."

Here, as in the *Thornhill* case, 310 U.S. at 97, is a prohibition "which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." It is obvious, then, that the broad and indiscriminate prohibitions against peaceful picketing in Case No. 364 deprive or previously restrain petitioners in the exercise of rights protected under the First Amendment as safeguarded against invasion by the state under the Fourteenth, and must be stricken or amended.

Conclusion

A single picket, in the one case carrying a sign stating simply that the employer is unfair to organized labor, and in the other case carrying a sign admonishing the public to look for the union-shop card, has been enjoined from patrolling the premises of an automobile dealer in a traditional labor dispute over whether the employer shall operate on Saturdays, Sundays and holidays, union agreements covering a major portion of the area all specifying that dealers shall not operate on such days. The picketing was entirely peaceful, nothing in the laws of the state prevented the automobile dealer from agreeing, as had other automobile dealers in the area, to operate only on the prescribed days, and there is no showing or claim that the picketing gave rise to any clear and present danger to any public interest, the employer with whom the immediate dispute existed alone suffering economic loss. It is respectfully submitted that under the foregoing circumstances such picketing cannot

be prohibited if freedom of communication in labor disputes is to survive and if the principles announced in *Thornhill's* case are to have any meaning.

Respectfully submitted,

J. ALBERT WOLL,
HERBERT S. THATCHER,
JAMES A. GLENN,
736 Bowen Building,
Washington 5, D. C.,
Counsel for
American Federation of Labor.